IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT NASHVILLE
Assigned on Briefs July 26, 2005

STATE OF TENNESSEE v. VICTOR L. POWELL

Direct Appeal from the Criminal Court for Davidson County
No. 2004-A-908 Steve Dozier, Judge

No. M2004-03034-CCA-R3-CD - Filed August 15, 2005

Following a bench trial, the defendant, Victor L. Powell, was convicted of driving under the influence (DUI), violating the implied consent law, and resisting arrest. He received a sentence of eleven months, twenty-nine days for DUI and a concurrent sentence of six months for resisting arrest. For his violation of the implied consent law, the defendant's license was suspended for one year. On appeal, the defendant argues the sufficiency of the convicting evidence. Upon review of the record and the parties' briefs, we affirm the judgments of the trial court.

Tenn. R. App. P. 3 Appeal as of Right; Judgments of the Criminal Court Affirmed

J.C. McLIN, J., delivered the opinion of the court, in which GARY R. WADE, P.J., and DAVID H. WELLES, J., joined.

Larry B. Felts, Nashville, Tennessee, for the appellant, Victor L. Powell.

Paul G. Summers, Attorney General and Reporter; Preston Shipp, Assistant Attorney General; Victor S. Johnson, III, District Attorney General; and Tammy Meade, Assistant District Attorney General, for the appellee, State of Tennessee.

OPINION

At trial, Officer Ronald L. Bright of the Metropolitan Nashville Police Department testified that on January 9, 2003, while on patrol, he noticed that the taillights of the defendant's vehicle were not functioning properly. Bright followed the defendant's vehicle and observed that the vehicle's temporary tag was not visible. Based on these traffic violations, Bright initiated a traffic stop. When Bright made contact with the defendant, he noticed an obvious odor of alcohol, and observed that the defendant had "bloodshot, watery eyes." Bright also observed a liquor bottle behind the driver's seat on the rear floorboard with the bottle's cap resting in the center consol. Bright further observed a few unopened beer cans and one open beer can underneath the driver's seat.

Officer Bright asked the defendant to exit his vehicle and noticed that the defendant was "a little unsteady on his feet." Bright told the defendant that based upon his observations, he believed the defendant had been drinking. Bright then asked the defendant several times if he would take a standard field sobriety test, but the defendant refused. Consequently, Bright advised the defendant that he was under arrest for DUI.

According to Officer Bright, the defendant pulled one of his arms away as he was being placed into custody. Bright and his partner immediately performed "a non-lethal takedown" on the defendant and placed him in handcuffs. Bright testified that prior to the arrest, the defendant was "boisterous, argumentative, [and] was cursing." Once Bright placed the defendant in his patrol car, he explained the implied consent law to the defendant, but again the defendant refused to take a breathalyzer test. On cross-examination, Bright acknowledged that the defendant did not have a problem communicating and complied with all of his instructions until he tried to take the defendant into custody. Bright further acknowledged that the defendant's car had trash in it.

Carey Ann Miller, the defendant's fiancee, testified that the defendant had been the victim of a car jacking in November of 2002. As a result of the carjacking, the defendant sustained injuries to his eyes, making them sensitive to light. Ms. Miller testified that the defendant was taking medication for his eye injuries.

The defendant testified that his car had been stolen after he was carjacked. The defendant explained that he recently received his car back from the police impound lot. The defendant stated that upon receipt of his car, he observed two big sacks of beer cans and other trash in his car. The defendant also noticed that someone had urinated and defecated in it. As the defendant explained, he did not have the opportunity to clean out the car before he was arrested. The defendant also stated that he had just received laser eye surgery and was taking steroids in order to quicken the healing process.

Regarding his arrest, the defendant testified that he did not pull his arm away from the police officer; but rather, he raised his arm to point to his companion, who was still in the car. According to the defendant, he raised his arm and told the officer, "What about him? . . . I need my keys from outta my car. . . . Just tell him he have to walk." The defendant stated that it was not his intent to resist but to make sure his car was "locked up and stuff." The defendant asserted that he did not resist the officer when placed on the ground. The defendant further asserted that he refused to perform the field sobriety tests because of his recent eye surgery and knife injuries received from the carjacking.

On cross examination, the defendant stated that he picked up his car from the police impound lot on January 8, 2003. He also stated that he had been carjacked about ten times. The defendant denied having unopened beer cans lying in the backseat of his car. He claimed that Officer Bright never asked him to take a breathalyzer test, but only asked him to submit to a blood test. As the defendant explained, he was asked to submit to a blood test only after being slammed to the ground by Bright. The defendant indicated that because of Bright's actions, he was upset and not

cooperative. The defendant also claimed that he only cursed at Bright in response to Bright saying, "[Y]ou seem like a little fairy."

The defendant argues that the evidence is insufficient to support his convictions for DUI and resisting arrest. The defendant contends that no proof was presented by the State establishing that he was under the influence of alcohol. The defendant also contends that moving his arm while talking to police does not constitute resisting arrest.

Our review begins with the well-established rule that once a defendant is found guilty, his or her presumption of innocence is removed and replaced with a presumption of guilt. State v. Evans, 838 S.W.2d 185, 191 (Tenn. 1992). Therefore, on appeal, the convicted defendant has the burden of demonstrating to this Court why the evidence will not support the jury's verdict. State v. Carruthers, 35 S.W.3d 516, 557-58 (Tenn. 2000); State v. Tuggle, 639 S.W.2d 913, 914 (Tenn. 1982). To meet this burden, the defendant must establish that no "rational trier of fact" could have found the essential elements of the crime beyond a reasonable doubt. Jackson v. Virginia, 443 U.S. 307, 319 (1979); State v. Evans, 108 S.W.3d 231, 236 (Tenn. 2003); Tenn. R. App. P. 13(e). In contrast, the jury's verdict approved by the trial judge accredits the State's witnesses and resolves all conflicts in favor of the State. State v. Harris, 839 S.W.2d 54, 75 (Tenn. 1992). The State is entitled to the strongest legitimate view of the evidence and all reasonable inferences which may be drawn from that evidence. Carruthers, 35 S.W.3d at 558. Questions concerning the credibility of the witnesses, conflicts in trial testimony, the weight and value to be given the evidence, and all factual issues raised by the evidence are resolved by the trier of fact and not this Court. State v. Bland, 958 S.W.2d 651, 659 (Tenn. 1997). We do not attempt to re-weigh or re-evaluate the evidence. State v. Reid, 91 S.W.3d 247, 277 (Tenn. 2002). Likewise, we do not replace the jury's inferences drawn from the circumstantial evidence with our own inferences. Id.

Tennessee Code Annotated section 55-10-401 states in relevant part:

> (a) It is unlawful for any person to drive or to be in physical control of any automobile or other motor driven vehicle on any of the public roads and highways of the state, or on any streets or alleys, or while on the premises of any shopping center, trailer park or any apartment house complex, or any other premises which is generally frequented by the public at large, while:
> (1) Under the influence of any intoxicant, marijuana, narcotic drug, or drug producing stimulating effects on the central nervous system. . . .

Additionally, Tennessee Code Annotated section 39-16-602(a) states:

> It is an offense for a person to intentionally prevent or obstruct anyone known to the person to be a law enforcement officer, or anyone acting in a law enforcement officer's presence and at such officer's direction, from effecting a stop, frisk, halt, arrest or search of any person, including the defendant, by using force against the law enforcement officer or another.

Force is defined as "compulsion by the use of physical power or violence and shall be broadly construed to accomplish the purposes of this title." Tenn. Code Ann. § 39-11-106(a)(12). This Court has previously held that movements such as "twisting, turning, pulling away," and "flailing one's arms" while police officers are attempting to place a defendant in custody is sufficient force to sustain a conviction for resisting arrest. See e.g., State v. Mary Margaret Boyd, No. M2004-00580-CCA-R3-CD, 2005 WL 885091 at *3 (Tenn. Crim. App., at Nashville, Apr. 15, 2005); State v. Daniel M. Tidwell, No. 01C01-9807-CC-00288, 1999 WL 436840, at *3 (Tenn. Crim. App., at Nashville, June 30, 1999).

In the instant case, Officer Bright testified that the defendant smelled of alcohol, had bloodshot, watery eyes, and was unsteady on his feet when exiting the vehicle. Bright also testified that he observed an open bottle of brandy, and open and unopened cans of beer lying in the defendant's vehicle. Bright further testified that the defendant refused to perform field sobriety tests or take a breathalyzer test. The defendant denied being intoxicated. As the defendant explained, the beer and the bottle of brandy were left by those individuals who carjacked his vehicle. The defendant also attributed his bloodshot eyes and unsteadiness to the injuries he received as a result of the carjacking.

In describing the defendant's actions in resisting arrest, Officer Bright testified that the defendant was boisterous, argumentative, and was cursing. Bright then testified that the defendant "pulled one of his arms" away as he was being handcuffed. Because of these movements, Bright had to take the defendant to the ground. As the defendant explained, he was not resisting arrest, but he was merely pointing to his companion and complaining about the future security of his vehicle.

Upon review of the evidence, we note that the trial court specifically indicated that he was accrediting Officer Bright's version of events over the defendant's version. The weight and credibility of the testimony of a witness and the reconciliation of conflicts in testimony, if any, are matters entrusted exclusively to the trier of fact. Viewing the evidence in a light most favorable to the State, we conclude that a rational trier of fact could find beyond a reasonable doubt that the defendant was guilty of DUI and resisting arrest. This issue is without merit.

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J.C. McLIN, JUDGE